Recent Decisions

Conflicts—Due Process of Law—Full Faith and Credit—Continuing Jurisdiction

A North Carolina court, supervising a testamentary trust, removed the trustee for misconduct. Trustee had left the state with the trust assets and was served both by publication and personally in the District of Columbia in compliance with North Carolina statutes. The successor trustee brought an action in the District Court of the District of Columbia for possession of the trust assets and an accounting. In this action, deposed trustee attacked the North Carolina removal proceeding for lack of jurisdiction. The district court granted summary judgment for the successor trustee. *Held*, on appeal, that the North Carolina proceeding was entitled to full faith and credit. The proceeding was *quasi in rem* and the trustee, already before the court in the general proceeding, is entitled to no more than constructive service. Judgment affirmed. *Boone v. Wachovia Bank & Trust Co.*, 163 F. 2d 809 (App. D.C. 1947).

In North Carolina, jurisdiction for removal of a testamentary trustee is in equity. *Cheshire v. 1st Presbyterian Church*, 221 N.C. 205, 19 S.E. 2d 855 (1942); *In re Smith's Estate*, 200 N.C. 272, 156 S.E. 494 (1931). The North Carolina court, being a court of equity, had inherent power to remove a trustee for cause. *North Carolina R.R. v. Wilson*, 81 N.C. 221 (1879); *Franz v. Buder*, 34 F. 2d 353 (C.C.A. 8th 1929); 3 Pomeroy, Equity Jurisprudence 2504 (4th ed. 1918).

If both the *res* and the trustee are in another state when an action to remove the trustee is instituted, a judgment of removal upon constructive service is ineffective and not entitled to full faith and credit. *Parker v. Kelley*, 166 Fed. 968 (W.D.N.Y. 1908). But once jurisdiction of the trust *res* has been acquired by the court, this jurisdiction is not lost by the improper removal of the *res* from its custody. *Pennington v. Smith*, 69 Fed. 188 (S.D.N.Y. 1895); 3 Freeman, Judgments 3142 (5th ed. 1925). Accord, *The Rio Grande*, 23 Wall. 458 (U.S. 1874). The North Carolina removal proceeding against the trustee with respect to the *res* was *quasi in rem*. *Freeman v. Alderson*, 119 U.S. 185 (1886); *Combs v. Combs*, 249 Ky. 155, 60 S.W. 2d 368 (1933); *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497 (1908). Since there was continuing jurisdiction over the *res*, due process was satisfied if the trustee received notice by con-

structive service. *Griffin v. Griffin*, 327 U.S. 220 (1945); *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913); *Letcher's Trustee v. German National Bank*, 134 Ky. 24, 119 S.W. 236, (1904); RESTATEMENT, CONFLICT OF LAWS §§75, 76 (1934).

By local law, title may vest in the successor trustee by the order of appointment without a conveyance from the predecessor trustee. 1 N.C. GEN. STAT. §1-227 (1943); *State v. Underwood*, 86 P. 2d 707 (Wyo. 1939); *Coster v. Coster*, 125 App. Div. 516, 109 N.Y. Supp. 798 (1st Dept. 1908); SCOTT, TRUSTS §109 (Supp. 1946); BOGERT, TRUSTS AND TRUSTEES §532 (1935); RESTATEMENT, TRUSTS §109 (1935).

Having established the jurisdiction of the state court over the *res*, and the reasonableness of the notice, federal courts must give full faith and credit to the proceeding of the state court. U.S. CONST. *Art.* IV, §1; REV. STAT. §905 (2d ed. 1878), 28 U.S.C. §687 (1940); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Ins. Co. v. Harris*, 97 U.S. 331 (1877); *Mills v. Duryee*, 7 Cranch 481 (U.S. 1813). When the court proceeding vests title of property, over which the court has jurisdiction, in the successor trustee, the technical distinction between an equity decree and a judgment at law is not controlling. Cf. *Fall v. Eastin*, 215 U.S. 1 (1909); *Meentz v. Comstock*, 230 Iowa 63, 296 N.W. 721 (1941); *Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919); RESTATEMENT, CONFLICT OF LAWS, §§449, 450 (1934); Goodrich, *Five Years of Conflict of Laws*, 32 VA. L. REV. 295, 328 (1946).

As an additional reason why the deposed trustee was not denied due process of law by constructive service, the court pointed out that there is continuing *in personam* jurisdiction over a trustee who is administering a trust under supervision of the court, since the administration is an integral part of the original proceeding. Accord, *Michigan Trust Co. v. Ferry, supra*; *Milliken v. Meyer*, 311 U.S. 457 (1940); *Hatch v. Hatch*, 192 Atl. 241 (N.J. Eq. 1937); *Moore v. Superior Ct.*, 203 Cal. 238, 263 Pac. 1009 (1928); *State v. District Ct.*, 46 Mont. 425, 128 Pac. 590 (1912). Jurisdiction acquired by consent or submission of the defendant is not lost by his subsequent attempt to withdraw his consent or submission. *Michigan Trust Co. v. Ferry, supra*; *Nations v. Johnson*, 24 How. 195 (U.S. 1860).

The desirability of the result of the principal case is obvious, else testamentary trustees by their own wrongful acts could forestall removal by leaving the jurisdiction with the trust assets.

Don W. Sears

CONSTITUTIONAL LAW—DUE PROCESS—NEW YORK OBSCENE PRINTS AND ARTICLES STATUTE HELD UNCONSTITUTIONAL

The appellant was a bookdealer who sold books and magazines containing stories dealing with crime and bloodshed. He was convicted of a violation of Section 1141 (2) of the New York Penal Statute which read in part, "a person who . . . has in his possession with intent to sell . . . any book, pamphlet, magazine, newspaper, or other printed paper devoted to the publication and principally made up of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crimes; . . . is guilty of a misdemeanor." Upon appeal the New York Appellate Court construed the statute as prohibiting distribution of magazines principally made up of criminal news or stories of deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person and upheld the conviction under this interpretation. *Held*, the statute, as construed, violates the Fourteenth Amendment to the Constitution of the United States because it is so vague and indefinite as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech and press. Judgment reversed. Frankfurter, Jackson and Burton, JJ., dissented. *Winters v. New York*, 68 Sup. Ct. 665 (1948).

The due process clause of the Fourteenth Amendment voids any penal law that fails to set up an ascertainable standard of guilt because people must be given fair notice of what acts to avoid. *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914). The test to be applied is whether the statute forbids or requires the doing of an act in terms so vague that men of ordinary intelligence are compelled to guess at its meaning and must necessarily differ as to its application. If so, the statute subjects the actor to an unreasonable risk and violates due process. *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The standard is satisfied if the language defining the abuse has a well-known technical or special meaning or a well-settled common law meaning. *Connally v. General Construction Co., supra*; *Omaechevarria v. Idaho*, 246 U.S. 343 (1918); *Nash v. United States*, 229 U.S. 373 (1913).

In the principal case the Court, at page 672, stated that the statute was not an effective notice of new crime. But the Court did not choose to rest its decision on the "void for vagueness" rule alone. In addition, it held that the statute abridged freedom of the press because it prohibited acts fairly within the guarantee. In so doing the Court cast grave doubts upon the validity of similar statutes existing in twenty states including Ohio. OHIO GEN. CODE §13035.

The publication and distribution of religious pamphlets are within the constitutional guarantee of free speech and press. *Lovell*

v. City of Griffin, 303 U.S. 444 (1938). The discussion and publication of political doctrines and opinions are also within the guarantee so long as they do not advocate the overthrow of the government by violence. *Stromberg v. California*, 283 U.S. 359 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937). By this decision the protection of freedom of the press has been extended to include magazines of no value to society which were apparently printed and sold solely for profit. The Court states that constitutional protection for a free press is not limited to the exposition of ideas yet it has been stated that the press "comprehends every sort of publication which affords a vehicle of *information and opinion.*" *Lovell v. City of Griffin*, *supra*, at 452. It is difficult to conceive of a magazine which is of no value to society that could be a vehicle of information and opinion. Nor did the decision in the *Herndon* case, in which the rule applied in the principal case was enunciated, extend to such publications as those in question. In that case the Court was dealing with the right to advocate political views. Clearly the present case is an extension of the application of the rule of the *Herndon* case.

The inclination of the Court in the past has been to uphold state statutes that were somewhat vague if they dealt with crimes difficult to define. *Omaechevarria v. Idaho*, *supra*; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). The policy formulated by this decision requires that the "void for vagueness" rule be strictly applied to those statutes restricting freedom of speech and press and freedom of the press now includes publications which have no value for society. It is evident that the court believes that no exception to the guarantee of free speech and press should be made regardless of how trivial the exception may seem. On page 671 the majority state, "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for a decision as to the expression of political views in the light of a statute intended to punish subversive activities."

Walter P. Davidson

CONSTITUTIONAL LAW—CONGRESSIONAL INVESTIGATING COMMITTEES

The Committee on Un-American Activities was duly authorized under the Legislative Reorganization Act of 1946 to conduct investigations of " (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our

Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 60 STAT. 812, 828. The appellant was summoned as a witness by the Sub-Committee of the Committee on Un-American Activities, to be sworn and to testify before the Sub-Committee on matters of inquiry referred to the Committee. He appeared pursuant to a subpoena but refused to be sworn and give any testimony. The appellant was indicted under a statute which reads in so far as here pertinent:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . or any Committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, . . . 2 U.S.C. §192 (1940).

Trial was by jury and after motions to set aside the verdict and in arrest of judgment had been denied, sentence was imposed. Appeal was taken, raising *inter alia,* the issue involving the constitutionality of the authorizing statute and its effect with regard to its application in the given set of circumstances. *Held,* the power of a Congressional Committee to investigate is not limited by Congress' power to legislate, and even though the authorizing statute is so vague as to permit inquiry into matters concerning the advocacy of peaceful changes of the form of government, as well as revolutionary, the appellant is in no position to so contend because he refused to answer any questions. *United States v. Josephson,* 165 F. 2d 82 (1947) (one judge dissenting).

The majority of the court based its decision on five propositions:

First, even though the authorizing statute is so vague as to give a witness before the Committee no criteria as to what is pertinent to the inquiry and what is not, the fact that some questions that were pertinent might have and probably would have been asked placed the witness in the position of being required to at least answer the pertinent inquiries. Reference is made to the statement of Mr. Justice Holmes in *Nash v. United States,* 229 U.S. 373, 377 (1913), that: ". . . the law is full of instances where a man's fate depends upon his estimating rightly, that is, as a jury subsequently estimates it, some matter of degree."

Second, the doctrine of *Kilbourn v. Thompson,* 103 U.S. 168 (1880), that neither house possesses a "general power of making inquiry into the private affairs of the citizens," but each house is

limited to inquiries relating to matters within its jurisdiction and in respect of which it may validly act, was held to be not applicable on the ground that an inquiry into the private affairs of a private citizen when the matter being inquired into may potentially affect the survival of the Government is not, in fact, an inquiry into the personal affairs per se but only an inquiry into personal affairs to the extent such individuals are a part of the Government as a whole. See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 219 (1927).

Third, even though the inquiry may expose the political beliefs and affiliations of individuals and groups to public view (and to the inquirees irreparable damage), and even though the members of the Committee and the Committee itself have stated the purpose thereof is not in fact legislative, and even though the Committee has proposed little or no legislation, the fact that the authorizing statute contains the declaration of Congress that the information sought is for legislative purposes is conclusive as to the purpose of the Committe. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 176-180 (1927).

Fourth, the absence of a presumption of constitutionality where civil liberties are concerned, *Thomas v. Collins*, 323 U.S. 516 (1945), is not applicable where the legislation has not yet been enacted, the court saying, "When speech . . . clearly presents an immediate danger to National security, the protection of the First Amendment ceases. Congress can then legislate. It is not for the courts to assume in advance that Congress will pass any legislation in violation of the First Amendment." The power of a Congressional Committee to investigate is not limited by Congress' power to legislate.

Fifth, as the Congressional power of investigation is as flexible as its power of legislation, the fact that it centers investigation on one problem or even one facet of a problem is not discriminatory, even though other problems equally serious are present and not being investigated. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911).

The dissenting judge bases his argument on the proposition that if the power of the legislature to inquire into the private opinion of an individual transcends either that of the judiciary or the power to legislate in a similar area, the Bill of Rights has a vulnerable area and its guaranties are effectively emasculated. Basic to his argument is the proposition that there are few, if any, rights of the people guarded by the fundamental law of the country transcending in importance the right to be exempt from all unauthorized, arbitrary and unreasonable inquiry and disclosure in

respect to their private affairs. *Kilbourn v. Thompson,* 103 U.S. 168 (1880). In support of his position several separate and distinct arguments are advanced.

First, the power and duty of the courts to scrutinize Congressional investigations lest they transcend constitutional limitations is supported by both precedent and text writers. *Kilbourn v. Thompson, supra; Constitutional Limitations on the un-American Activities Committee,* 47 COL. L. REV. 416 (1947).

Second, the statute authorizing the inquiry is general in terms and makes no attempt to define the pertinent inquiries of Congress, and all attempts to explain the meaning of the key word "un-American" have been avoided or opposed, nor has any legislation come from the Committee itself. The statute as here used is penal in nature and should be set forth with clarity so that the person to whom it applies may determine what conduct is legal and what conduct is illegal. *United States v. Lovett,* 328 U.S. 303 (1946); *Schneiderman v. United States,* 320 U.S. 118 (1943).

Third, before utterances can be punished it should appear clearly that the substantive evils resulting therefrom present an imminent danger to the welfare of the state. *Bridges v. California,* 314 U.S. 252 (1941). The fear of fear should not be confused with the danger itself. Ogden, *The Dies Committee,* 2d Rev. Ed. 1945. When Congress can attack under the authorizing statute any conduct departing from the status quo, or norm, there can be no justification for such wide reaches of authority; especially when it poses no great difficulty to provide for an investigation of proper scope which would clearly be constitutional. *Dunne v. United States,* 138 F. 2d 137 (C.C.A. 8th 1943). The fact that under the present statute clearly dangerous activity may be investigated cannot sustain the entirety of the statute when under it innocent conduct can likewise be invaded and exposed. Such a thesis would make the Congressional power of investigation limitless.

The dissenting judge concludes his argument with the self evident proposition that any investigation dealing with constitutional liberties carries inherently its own self destructive power if not constitutionally conducted inasmuch as the success of a democracy lies in the confidence of the people in the conduct of its public office. *James F. Shumaker*

CORPORATIONS—SHAREHOLDERS' RIGHT TO BRING A DERIVATIVE SUIT

Plaintiffs, minority shareholders of callable preferred stock, instituted a derivative suit. The defendant corporation thereupon redeemed their shares and moved to dismiss the action. *Held,* that

elimination of plaintiffs as shareholders did not extinguish their right to bring a derivative suit. Motion denied. *Kantor v. Stendig*, 118 N.Y.L.J. 1557, 2 P-H CORP. SERV. 20113 (Sup. Ct. N.Y. 1947).

One characteristic of the shareholders', or derivative, suit is that the corporation must be named as a party defendant. *Davenport v. Dows*, 18 *Wall.* 627 (U.S. 1874); *e.g.*, *Dean v. Kellogg*, 294 Mich. 200, 292 N.W. 704 (1940); *Deming v. Beatty*, 72 Kan. 614, 84 Pac. 385 (1906); *Converse v. United Shoe Machinery Corp.*, 209 Mass. 539, 95 N.E. 929 (1911); BALLANTINE, CORPORATIONS 341 (Rev. ed. 1946). The judgment should conclude not only the shareholders prosecuting the suit and the culpable individuals, but it should also conclude the corporation. The possibility that the culpable individuals may suffer judgment for the full amount of the corporate wrong in a suit brought by shareholders and then be subjected to another suit on the same facts brought by the corporation in its own right is one that is foreign to our concepts of justice. The most effective way to prevent this possibility from materializing is to name the corporation a party to the action, and this is the principal reason joinder is required. *Gerith Realty Corp. v. Normandie National Securities Corp.*, 154 Misc. 615, 276 N.Y. Supp. 655 (Sup. Ct. 1933); *Turner v. United Mineral Lands Corp.*, 308 Mass. 531, 33 N.E. 2d 282 (1941).

The shareholders bringing a derivative suit are the only plaintiffs appearing on the petition. Having divorced the plaintiffs in the instant case from their status in the corporation as shareholders, defendants contended no one was left to prosecute the suit. But in a realistic sense the corporation is also a plaintiff; it is the beneficial plaintiff, for any sum recovered in the derivative suit becomes its property. *Monahan v. Kenny*, 248 App. Div. 159, 288 N.Y. Supp. 323 (1st Dep't 1936); *Potter v. Walker*, 252 App. Div. 244, 293 N.Y. Supp. 161 (1st Dep't 1937), *aff'd*, 276 N.Y. 15 (1937); *Coxe v. Hart*, 53 Mich. 557, 19 N.W. 183 (1884); *Wasmer v. Massillon Iron Co.*, 7 Ohio App. 488, 40 Ohio C.C. 575 (1916); STEVENS, CORPORATIONS 666 (1936). Shareholders, including those bringing the suit, receive no part of the money judgment. They benefit indirectly by the increment in the book value of their shares. *Hayden v. Perfection Cooler Co.*, 227 Mass. 589, 116 N.E. 871 (1917); *Harden v. Eastern States Public Service Co.*, 14 Del. Ch. 156, 122 Atl. 705 (1923); STEVENS, CORPORATIONS 657 (1936); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 YALE LAW J. 580 (1924).

Professor Ballantine states the rule for determining sufficiency of interest to sue in a derivative suit as follows: "In order that a person may maintain a suit as shareholder . . . he must be an owner of shares or have some beneficial interest therein when suit is brought and, also, while it is pending so that he will benefit by the

relief given." BALLANTINE, CORPORATIONS 350 (Rev. ed. 1946). Thus, in a case involving an involuntary sale of shares by levy under a writ of execution, a derivative suit commenced by the former shareholder was dismissed. *Polish American Publishing Co. v. Wojick*, 280 Mich. 466, 273 N.W. 771 (1937); Cf. *Brewer v. Dodge*, 28 Mich. 359 (1873). Professor Ballantine's statement of the rule has by no means been given universal acceptance, however; by the weight of authority, it is required only that the plaintiff be a shareholder when the suit is instituted. *Fry v. Rush*, 63 Kan. 429, 436, 65 Pac. 701, 703 (1901); *Hanna v. Lyon*, 179 N.Y. 107, 71 N.E. 778 (1904); *Zinn v. Baxter*, 65 Ohio St. 341, 369, 62 N.E. 327, 332 (1901); 6 THOMPSON, CORPORATIONS 534 (3rd ed. 1927). Even under the Ballantine rule, an exception would probably be made where the corporation redeems the plaintiffs' shares for the express purpose of avoiding derivative suit. Otherwise, the very wrongdoers who made institution of the suit necessary could, by virtue of their control of the corporation, defeat shareholders' attempts to force rectification.

Donald W. Fisher

CRIMINAL LAW—MURDER—INTENT TO KILL

The accused intentionally anesthetized an eleven year old girl by administering chloroform from a bottle labeled "poison." He then raped her. After this act he returned to his couch in the living room. Later, hearing a moan in the room where his victim and her sister were sleeping, he returned to their room and unsuccessfully attempted to awaken his victim. She was taken to a hospital and pronounced dead. The accused was indicted for forcible rape and for first degree murder. The indictments were consolidated, a jury trial was waived, and the accused was tried to a court consisting of three judges. He was found guilty of rape and of murder in the first degree by means of poisoning while in the commission of rape. The conviction was affirmed by the Court of Appeals. *Held*, on appeal to the Supreme Court, conviction affirmed. To warrant a conviction of murder in the first degree, all the elements of the crime as defined by Section 12400, General Code, including the element of *intent to kill*, must be established beyond a reasonable doubt. The trial judges sitting as judge and jury had found all the necessary elements, including intent to kill, to have been proved beyond a reasonable doubt. *State v. Salter*, 149 Ohio St. 264, 78 N.E. 2d 575 (1948).

Ohio has no crimes except as provided by statute. *Fouts v.*

State, 8 Ohio St. 98, 111 (1857); *Stockum v. State*, 106 Ohio St. 249, 139 N.E. 855 (1922). Murder in the first degree is defined by Section 12400, General Code as follows:

"Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life."

At common law, malice was implied as a matter of law if a homicide occurred during commission of a felony, and such a killing was murder whether or not intent to kill existed. CLARK AND MARSHALL, LAW OF CRIMES §245 (4th ed. 1940); MILLER, CRIMINAL LAW 269 (1934). The usual construction of the Ohio statute has been that the word *purposely* qualifies all that follows it and that the killing of another is not murder unless done with intent *to kill*. *State v. Turner*, Wright 20, 27 (Ohio 1831); *Robbins v. State*, 8 Ohio St. 131, 190 (1857), (construction of statute substantially the same as present statute); *Fouts v. State*, 8 Ohio St. 98, 112 (1857); *Stephens v. State*, 42 Ohio St. 150 (1884); *Jones v. State*, 51 Ohio St. 331, 341 (1894); *Munday v. State*, 5 C.C. (N.S.) 656, 662, 26 O.C. 712, 716 (1904), *aff'd*, 72 Ohio St. 614, 76 N.E. 1132 (1905); *Turk v. State*, 48 Ohio App. 489, 194 N.E. 425 (1934), *aff'd*, 129 Ohio St. 245, 194 N.E. 453 (1935).

The majority opinion concedes that to sustain a conviction of murder in the first degree there must be an intentional killing, but that the intent could be inferred from knowingly and purposely using chloroform when accused knew that it was poison and that death might result from its use. The *Robbins* case, the leading case in Ohio construing the statutory definition of first degree murder, was distinguished on the ground that no instructions to a jury were involved in the instant case. The concurring opinion rejected the views expressed in the majority opinion of the *Robbins* case and stated that "murder in the first degree results from purposely killing another with deliberate and premeditated malice, or from killing another by *purposely administering poison*, or in the *purposeful perpetration or attempting to perpetrate rape*, etc." (Emphasis supplied.) Substantially the same language is embodied in the syllabus of the case, although the syllabus is a direct quotation of the "rule" set out in the majority opinion. A vigorous dissent is noteworthy for its careful analysis of the syntactical structure of the statute. The dissenting judges contended that there was no evidence in the record of an intent to kill and that therefore the conviction was erroneous.

The majority opinion is unassailable because it carefully pointed out that intent to kill had been found by the trial judges. But it is stated that the syllabus of the case is the law in Ohio. 94 Ohio St. Preliminary p. ix (1917) (Reporter's Note); *State v. Hauser*, 101 Ohio St. 404, 131 N.E. 66 (1920); *Baltimore & Ohio R.R. v. Baillie*, 112 Ohio St. 567, 148 N.E. 233 (1925); *Thackery v. Helfrich*, 123 Ohio St. 334, 175 N.E. 449 (1931); 136 Ohio St. Preliminary p. lxxii (1940) (Clerk's Note); Note, 14 U. OF CIN. L. REV. 572 (1940). Therefore it is submitted that the result in the instant case is a departure from the interpretation of the statute as developed by past decisions, despite the effort to "distinguish" such cases. It is possible that the *Salter* case might be used as a precedent for a conviction of first degree murder where intent to kill was absent.

Robert J. Lynn

DAMAGES—BREACH OF CORRESPONDENCE SCHOOL CONTRACT

Plaintiff, a correspondence school, was prevented from fully performing its contract for instruction by the refusal of the defendant to continue his course of study. Plaintiff recovered a judgment in a justice of the peace court for the balance due on the contract. On appeal and retrial in the court of common pleas judgment was affirmed, but only nominal damages were allowed. Plaintiff appealed. *Held*, judgment affirmed. *Refrigeration & Air Conditioning Institute v. Rine*, 80 Ohio App. 317, 75 N.E. 2d 473 (1946).

The sole issue raised on appeal was the determination of the proper measure of damages. The principal case cited with approval Michigan decisions to the effect that the plaintiff may recover only the cost of his services and materials, together with the profit he would have taken from the contract, had it been fully performed. *Walton School of Commerce v. Stroud*, 248 Mich. 85, 226 N.W. 883 (1929).

However, a number of jurisdictions permit recovery of the full contract price. Massachusetts courts permit such recovery on the theory that the correspondence school contract consists of independent covenants. *International Text-Book Co. v. Martin*, 221 Mass. 1, 108 N.E. 469 (1915). Other courts state that such contracts are entire, and, therefore, the plaintiff is entitled to the consideration agreed upon unless the defendant can show facts in mitigation of the damages. *International Text-Book Co. v. Martin*, 82 Neb. 403, 117 N.W. 994 (1908); *International Correspondence School, Inc. v. Crabtree*, 162 Tenn. 70, 34 S.W. 2d 447 (1931).

The particular elements recoverable in an action on the contract are expenditures toward performance and profits contemplated

under the contract. Expenditures recoverable are, first, "the reasonable value" of goods delivered and services rendered; second, any definite expenditure made toward further performance; third, any expenditure or loss incurred in undertaking and preparing to perform the contract.

It is the established rule in Ohio that only actual damages are recoverable in an action on the contract (in the absence of specific provision of law for allowance of punitive damages), and in no case is the plaintiff to be placed in a better position by reason of the defendant's breach. *Cleveland Co. v. Standard Amusement Co.* 103 Ohio St. 382, 133 N.E. 615 (1921); *Doolittle & Chamberlain v. McCullough*, 12 Ohio St. 360 (1861). It is to be noted that unless the allowance for that part of the contract performed is taken to be the cost of performance, rather than the reasonable value of performance, the plaintiff would be more than compensated for his loss, since he is entitled to profits as well as expenses. However, the plaintiff may, if the reasonable value of his goods and services exceeds the cost to him by more than his margin of profit, disregard the contract and sue in quantum meruit, in which case the reasonable value is the proper measure of recovery. *Cleveland Co. v. Standard Amusement Co., supra*; *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182, 48 N.E. 888 (1897).

The modern view, affirmed in the principal case, is that profits may be recovered when not speculative, contingent, or uncertain. Such recovery is limited to the profits possible under the contract and is measured by the difference between the contract price and the estimated cost of full performance after deduction of the cost of completing performance. *Buchholz v. Green Brothers Co.*, 272 Mass 49, 172 N.E. 101 (1930).

The Ohio court has adopted the view set forth above as the correct application of the principle of compensation. Yet when the plaintiff fails to prove actual damage from the defendant's breach, only nominal damages may be recovered. Thus, as in the instant case the burden of proving damage is placed upon the party best able to produce the necessary facts. Cf. *Dale System v. Wichroski*, 320 Mass. 319, 69 N.E. 2d 241 (1946); *McNulty v. Whitney*, 273 Mass. 494, 174 N.E. 121 (1930).

Charles E. Westervelt, Jr.

DIVORCE — CONDONATION BY COHABITATION

A husband sued his wife for divorce and clearly established the ground of adultery. Defendant alleged condonation as a defense and proved that the parties had continued to occupy the

same house after plaintiff had obtained full knowledge of defendant's infidelity. Defendant's claim that an act of marital intercourse had been committed during this period was denied by plaintiff. *Held,* divorce denied. *Huffine v. Huffine,* 74 N.E. 2d 764 (Ct. of C.P., Van Wert County, Ohio, 1947).

Condonation is generally defined as the conditional forgiveness of a matrimonial offense by the aggrieved spouse. 27 C.J.S. DIVORCE §59. It is an affirmative defense and must be specifically alleged. *Winnard v. Winnard,* 62 Ohio App. 351, 23 N.E. 2d 977 (1939). Sexual intercourse is not an essential element of condonation but it is conclusive proof thereof. *Phinizy v. Phinizy,* 154 Ga. 199, 114 S.E. 193 (1922). In the principal case, although no prior Ohio case had so held, the court agreed with the weight of authority that a single act of intercourse constitutes condonation. *Shackleton v. Shackleton,* 48 N.J. Eq. 364, 21 Atl. 935 (1891); *Shirey v. Shirey,* 87 Ark. 175, 112 S.W. 369 (1908); 14 CYC. 641; 2 BISHOP, MARRIAGE AND DIVORCE, §282 (1891); but cf. *Drew v. Drew,* 250 Mass. 41, 144 N.E. 763 (1924) (single act of intercourse is only evidence of an intention to forgive). A single act of sexual intercourse is insufficient as condonation under CAL. CIV. CODE §116 (1941). *Bohnert v. Bohnert,* 95 Cal. 444, 30 Pac. 590 (1892). One Ohio court quoted favorably from *Collins v. Collins,* 194 La. 446, 193 So. 702 (1940), where a single act of intercourse was held sufficient. *Mears v. Mears,* 15 Ohio Supp. 61, 30 Ohio Op. 177 (1945). (Ct. of C.P., Tuscarawas County, Ohio, 1945).

In the principal case the court was faced with the problem of whether an act of intercourse had occurred. The court, at page 768, said that "although there should be no presumption that the plaintiff and defendant, living under the same roof during the pendency of a divorce action have continued relations, nevertheless where the defendant claims condonation . . . her testimony is sufficiently corroborated by the fact that the parties have resided in the same house." It is difficult to see just how the above statement is anything other than the presumption which at the outset the court undertook to deny. *Burns v. Burns,* 60 Ind. 259 (1877). Had the court applied the rebuttable presumption that married people living in the same house reside on terms of matrimonial cohabitation, it would have been in accord with the decided weight of authority in this country. *Pepin v. Pepin,* 206 N. Y. Supp. 732, 123 N.Y. Misc. 888 (Sup. Ct. 1924); *Todd v. Todd,* 37 Atl. 766 (N.J. Ch. 1897); *Lee v. Lee,* 51 Ill. App. 565 (1893); 27 C.J.S. DIVORCE §61(d). Contra: *Denison v. Denison,* 4 Wash. 705, 30 Pac. 1100 (1892). See 14 CYC. 641 where the presumption is said to be limited to cases in which the parties occupy the same room and bed.

Dictum in the *Huffine* case states that it works no hardship on

the plaintiff to hold that he dwells in the same house with the offending spouse at his peril, since the law provides means by which the parties can be separated. OHIO GEN. CODE §11994; In re *Cattell*, 146 Ohio St. 112, 64 N.E. 2d 416 (1945). However, it is not in every case that a plaintiff can be expected to abandon the home, particularly when there exists an acute housing shortage. There may be other considerations inducing plaintiff to remain in the same house such as the protection of children and the safeguarding of property. *Sayles v. Sayles*, 41 R.I. 170, 103 Atl. 225 (1918) (to obtain custody of the children); *Guthrie v. Guthrie*, 26 Mo. App. 566 (1887) (plaintiff returned to nurse defendant-husband). See *Toulson v. Toulson*, 93 Md. 754, 50 Atl. 401 (1901).

It is believed that a plaintiff should be able to remain in the same house with the offending spouse without being presumed to have forgiven the defendant's transgressions, and thus to have lost his cause of action for a divorce.

William M. Cromer

EMINENT DOMAIN — JUST COMPENSATION FOR TEMPORARY SEIZURE OF STRIKEBOUND FERRIES

Complainant's ferry boats, connecting arterial highways across Hampton Roads, Virginia, were idle because of a labor strike. On February 22, 1946, under authority of an act of the General Assembly of Virginia (Acts 1946 c. 39) granting power of eminent domain for temporary seizure "Whenever the owner or operator of any ferry . . . is unable for any reason to operate [the ferry] . . .," the State Highway Commissioner took control and began operation of complainant's docks and ferries. Complainant sought, as compensation for the seizure, net profits resulting from the Highway Commissioner's operation. The Commissioner contended the proper measure of compensation was six per centum interest on $240,000, the value of the property as assessed for tax purposes, plus an allowance for wear and tear. Profits realized by the state for the period in controversy totalled $400,000. *Held*, that just compensation in temporary eminent domain seizure is fair rental value with reference to the value of the property and the earning capacity at the time of taking; that a company which is not a going concern at the time of taking may not have, as the measure of just compensation, profit realized by the sovereign, in the use of the property for the public welfare. *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 43 S.E. 2d 10 (1947).

While the Federal Constitution guarantees "just compensation,"

it does not define the term. But established doctrine has it that compensation is deemed to be just which represents the value of the condemned property at the time of the taking. 2 BONBRIGHT, VALUATION OF PROPERTY 408 (1st ed. 1937). Fundamental in judicial determination of value is Justice Holmes' test: "What has the owner lost? Not, what has the taker gained?" *Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195 (1909). The usual method of the courts in arriving at the loss suffered by the owner is, in the case of a permanent seizure, to determine a fair market value. *Mississippi and Rum River Boom Co. v. Patterson,* 98 U.S. 403, 408 (1878). A fair rental value is the corresponding criterion in the case of a temporary seizure. *Egan v. Philadelphia,* 109 Pa. Super. 271, 164 Atl. 813 (1933). But cf. *General Motors Corp. v. United States,* 323 U.S. 373 (1945).

The basic problem in the principal case is the extent to which profits earned as a result of seizure by the state shall be a factor in the determination of a fair rental value. The owner is entitled to all elements of value inhering in the property at the time of taking, considering all uses for which it is suitable. *Mississippi and Rum River Boom Co. v. Patterson, supra; Appalachian Power Co. v. Johnson,* 137 Va. 12, 119 S.E. 253 (1923). But the value to be ascertained does not include any element resulting subsequent to or because of the taking. *Olson v. United States,* 292 U.S. 246 (1933). Consequential loss of business profits as such is not allowable. *Mitchell v. United States,* 267 U.S. 341 (1924). However present value of clearly to-be-expected future earnings may be considered, *Brooklyn Eastern District Terminal v. City of New York,* 139 F. 2d 1007 (C.C.A. 2d 1944), and loss of a franchise to charge tolls through seizure of a dam is a compensable loss, the value of which is reflected by the profits inuring from the right to charge tolls. *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).

The principal case is decided ultimately on the ground that although earning capacity is a factor to be considered in the determination of fair rental value, unless the property seized is that of a going concern, that factor adds nothing to the value of what the owner has lost. By this reasoning the court escapes the rule of *Monongahela Navigation Co. v. United States, supra,* relied upon by the dissent.

Allowing the owner the profit while the state assumes the risks of business enterprise would tend to discourage the owner's consummating an agreement with his striking employees. Yet, as the majority assumed, the best interests of the public are subserved by speedy settlement of strikes. Pointing in the same direction are incentive considerations of an even larger order. Under traditional economic theory the justification for the profit system is to provide

business incentive. 2 BONBRIGHT, VALUATION OF PROPERTY 409 (1st ed. 1937). Profit, therefore, should be realized only if it supplies this incentive. Realization of profit from the temporary seizure of property which would remain unproductive but for the seizure fails to satisfy this condition.

On the other hand extremely low compensation places the owner in a disadvantageous position for collective bargaining. Apparently the Virginia Legislature anticipated this dilemma and in January, 1947 enacted a comprehensive statute (Acts 1947, c. 9) authorizing the seizure of any public utility in the interest of the public welfare. The Act provides that the state should reimburse itself for all expenses of operation and should thereafter retain 15% of the net income, paying the remaining 85% to the utility owner "as compensation for the use of its established business, its facilities and properties."

James T. Lynn, Jr.

EQUITY — SPECIFIC PERFORMANCE OF OPTION TO RENEW LEASE

Plaintiff leased a storeroom for a period of two years. The lease contained an option to renew, by giving notice, at a rental to be agreed upon by the parties. Plaintiff gave proper notice but defendant refused to carry out the covenant. Plaintiff brought an action for specific performance. Judgment of the trial court refusing specific performance because of the uncertainty of the option was affirmed by the court of appeals. The plaintiff appealed to the supreme court. *Held,* reversed and specific performance granted. It was implicit that the rental should be for a reasonable amount. *Moss v. Olson,* 148 Ohio St. 625, 76 N.E. 2d 875 (1947).

Some authorities indicate that a greater degree of certainty is required for the enforcement of a contract in equity than is required for the collection of damages on a contract at law. *Minnesota Tribune Co. v. Associated Press,* 83 Fed. 350 (C.C.A. 8th 1897); 5 WILLISTON, CONTRACTS §1424 (Rev. ed. 1937); RESTATEMENT, CONTRACTS §370, comment b; COOK, CASES ON EQUITY 590 n. 23a (3d ed. 1940); POMEROY, SPECIFIC PERFORMANCE §159 (3d ed. 1926). However, another line of reasoning declares that if the contract is sufficiently definite for the jury to assess damages, it is sufficiently definitive for specific performance. *Jones v. Parker,* 163 Mass. 564, 40 N.E. 1044 (1895); WALSH, EQUITY 329 (1930).

With respect to leases, the general rule is that an option to renew at a rental to be agreed upon is too indefinite for enforcement. *Candler v. Smith,* 168 Ga. 276, 147 S.E. 552 (1929); *Giglio v. Saia,*

140 Miss. 769, 106 So. 513 (1926). But some courts recognizing the practical business utility of such clauses, have interpreted them as anticipating a reasonable rental under the circumstances. *Diettrich v. Newberry Co.,* 172 Wash. 18, 19 P. 2d 115 (1933); *Edwards v. Tobin,* 132 Ore. 38, 284 Pac. 562 (1930).

If that which is sought to be fixed by future agreement is an essential element of the contract, no legal obligation can arise until the agreement is consummated. *Wade v. Lutterlah,* 196 N.C. 116, 144 S.E. 694 (1928); *St. Regis Paper Co. v. Hubbs & H. Paper Co.,* 235 N.Y. 30, 138 N.E. 495 (1923); *Denton v. Booth,* 202 Mich. 215, 168 N.W. 491 (1918); 1 WILLISTON, CONTRACTS §45 (Rev. ed. 1937). Thus, if a legal duty has not arisen because the agreement is indefinite and uncertain, there can be no right, and if there be no right, there necessarily can be no remedy. Courts differ on the question as to whether the fixing of the rental is an essential element of the contract. For examples of courts holding the agreement to be an essential element of the contract see *Metcalf Auto Co. v. Norton,* 119 Me. 103, 109 Atl. 384 (1920); *Sammis v. Huntington,* 186 App. Div. 463, 174 N.Y. Supp. 610 (2d Dep't 1919); *Duffield v. Whitlock,* 26 Wend. 55 (N.Y. 1841). The court in the principal case *held* that the fixing of the rental was not an essential element of the contract and upon the giving of proper notice, the identical lease was thereby extended at a reasonable rental. Accord, *Edwards v. Tobin, supra*; *Kauffman v. Liggett,* 209 Pa. 87, 58 Atl. 129 (1904); *Town of Bristol v. Bristol & Warren Waterworks,* 19 R.I. 413, 34 Atl. 359 (1896).

The dissent took the view that enforcement of the option was contingent upon the agreement of the parties, and such condition precedent not having been met, the state, acting through the courts, should not have made a contract where none in fact existed.

William J. Lee, Jr.

LABOR LAW — CONSTITUTIONAL LAW — LABOR DISPUTE AND PICKETING AS FREE SPEECH IN OHIO

Plaintiff operated an automobile sales agency and a garage under an open shop. Defendant union conducted an organizing campaign, and six of plaintiff's employees joined. Defendant began negotiations for a union shop; an election was had which resulted in the decisive vote of 13 to 2 against the union. Defendant, thereupon, stated that plaintiff's establishment would be picketed and closed. A few days later some 100 pickets, none of whom were employees, were milling around plaintiff's building. The picketing, directed by the union, was accompanied by violence. Plaintiff ob-

tained a temporary restraining order enjoining all picketing pending final hearing. *Held,* on final hearing, a labor dispute may exist in the absence of disagreement between an employer and his employees, and picketing to publicize that controversy is entitled to protection of free speech; but because of the past violence, certain limitations were imposed on future picketing. *Jones, Inc. v. International Association of Machinists,* 49 Ohio L. Abs. 97, 75 N.E. 2d 446 (C.P. 1947).

Ohio courts for many years have held that peaceful picketing during a strike may not be enjoined. *La France Co. v. International Electrical Workers,* 108 Ohio St. 61, 140 N.E. 899 (1923). But to enjoy the right of peaceful picketing, a trade dispute was required to exist. *La France* case, *supra; Crosby v. Rath,* 136 Ohio St. 352, 25 N.E. 2d 934 (1940), *cert. denied,* 312 U.S. 690 (1941). A trade dispute existed only when there was a direct controversy between an employer and his employees. *La France* case, *supra; Crosby v. Rath, supra.* See notes, 2 OHIO ST. L.J. 301 (1936); 6 OHIO ST. L.J. 334 (1940); 7 OHIO ST. L.J. 454 (1941).

The United States Supreme Court has identified picketing as free speech. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *A. F. of L. v. Swing,* 312 U.S. 321 (1941).

By virtue of the doctrine that picketing is an object of free speech, the United States Supreme Court has limited the power of both state legislatures and state judiciaries to impair that right, and in marking out the permissible limits of economic conflict, has made it clear that the existence or non-existence of a labor dispute is no longer a valid limitation. "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *A. F. of L. v. Swing, supra, at* 326. By this doctrine, the right of free speech guaranteed by the Fourteenth Amendment rendered a state court powerless, notwithstanding the absence of a labor dispute, to enjoin peaceful picketing. *Bakery Drivers v. Wohl,* 315 U.S. 769 (1942); accord, *Naprawa v. Chicago Flat Janitors' Union,* 315 Ill. App. 328, 43 N.E. 2d 198 (1942); *O'Neil v. Building Service Union,* 9 Wash. 2d 507, 115 P. 2d 662 (1941). But the right is not an absolute grant of free speech and is subject to reasonable limitation. For example, peaceful picketing is enjoinable if carried on for an unlawful objective; *Bakery Drivers Union v. Wohl, supra;* or if it lacks some rational nexus with the dispute; *Carpenters and Joiners Union v. Ritter's Cafe,* 315 U.S. 722 (1942); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942).

In spite of the identification of picketing as free speech by the

United States Supreme Court, which has made the right to picket a federal question, Ohio has continued to hold that a labor dispute must exist in order to enjoy the right to picket peacefully. The confused thinking of the Ohio courts may be traced directly to *Crosby v. Rath, supra,* where the Supreme Court of Ohio sustained an injunction and held that a trade dispute does not exist when members of the picketing union are neither employees, nor former employees. Since certiorari was denied by the United States Supreme Court, Ohio courts have since placidly cited the *Crosby* case as valid authority for enjoining peaceful picketing in the absence of a labor dispute. The record in the *Crosby* case is replete with violence which would seem an adequate ground for an injunction even in view of later United States Supreme Court cases. Cf *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287 (1941). At least one Ohio case made such a distinction in permitting peaceful picketing of a partnership having no employees. *Evans v. Retail Clerks' Union,* 66 Ohio App. 158, 32 N.E. 2d 51 (1940).

The principal case significantly recognizes the limitation of the power of a court to restrain picketing, but instead of completely identifying picketing with free speech, curiously broadens the definition of "labor dispute" to include a controversy between a union and an employer. ". . . it is the opinion of this court that the rule announced by the Crosby case, to wit, that a labor dispute did not exist in the absence of disagreement between an employer and its employees is no longer valid . . ." 49 Ohio L. Abs. at 101, 75 N.E. 2d at 449.

The principal case by adopting this line of reasoning appears to have misconstrued the *Swing* case, *supra,* for that case did not purport to enlarge the scope of "labor dispute," but recognized the right of free speech even in the absence of such a dispute.

It is arguable that all future peaceful picketing should be enjoined if there is a background of violence; or that if the isolated acts of violence fall short of constituting such a background, no restraint should be imposed. However, it is submitted that Judge Griffin, in the principal case, is to be commended for placing limitations on the future peaceful picketing in order that all parties may be protected without destroying the right to picket peacefully. Accord, *Isolantile, Inc. v. United Electrical Workers,* 130 N.J. Eq. 506, 22 A. 2d 796 (1941). *William B. Devaney, Jr.*

LABOR LAW — INJUNCTION GRANTED EMPLOYER UNDER SECTION 303 OF LABOR-MANAGEMENT RELATIONS ACT OF 1947

The Amalgamated Meat Cutters Union had demanded that the Schmidt Packing Co. recognize it as bargaining agent for at least

those employees of Schmidt who were union members. The union also demanded the reinstatement of several employees who had been discharged allegedly because of union activities. When the company refused to acquiesce in the demands of the union, the union called a strike and 11 of the company's 90 employees joined in the walkout. The union maintained a picket line around the plant of the employer and also around the places of business of some of the employer's customers. There was no evidence of violence or disorder. The Schmidt Packing Co. sought and received a temporary restraining order in the court of common pleas. *Held,* on defendants' motion to dissolve the restraining order, the union and striking employees were properly restrained from picketing the company's place of business, the places of business of the company's customers, and from intimidating, coercing, or threatening employees of the plaintiff or customers of the plaintiff. Motion denied. *Schmidt Packing Co. v. Local No. 346, Amalgamated Meat Cutters,* 21 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2467 (Ohio C.P. Dec. 19, 1947).

In denying the defendants' motion the court predicated its opinion on Section 303 of the Labor-Management Relations Act of 1947, popularly known as the Taft-Hartley Act, and found that (a) the company was engaged in interstate commerce and (b) that a labor dispute in fact existed between the litigants.

Ohio has repeatedly held that a labor dispute exists where there is a controversy, concerning terms and conditions of employment, between persons standing in the immediate relation of employer and employee. *Crosby v. Rath,* 136 Ohio St. 352, 25 N.E. 2d 934 (1940), *cert. denied,* 312 U.S. 690 (1941); *La France Electrical Co. v. International Electrical Workers,* 108 Ohio St. 61, 140 N.E. 899 (1923); *Lundoff-Bicknell Co. v. Smith,* 24 Ohio App. 294, 156 N.E. 243 (1927); *Wiley v. Retail Clerk Ass'n Union,* 32 Ohio N.P. (N.S.) 257 (1934); Note, 2 OHIO ST. L. J. 301 (1936). The federal statutes, including the Norris-LaGuardia Act, Fair Labor Standards Act, and the National Labor Relations Act have adopted a much broader definition than the one adhered to in Ohio. The Labor-Management Relations Act (LMRA) adopts the wording of the Norris-LaGuardia Act in defining a labor dispute as "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." The controversy in the principal case between Schmidt and his employees would constitute a labor dispute even under the narrow Ohio view and *a fortiori* would fall within the broader concept adopted by the LMRA. Although the finding in the principal case was couched in enigmatic language the court apparently concluded that a trade dispute did exist, for it

discussed United States Supreme Court decisions involving labor disputes and relied upon the LMRA for portions of its opinion.

Where a valid labor dispute existed the Ohio courts heretofore have always protected the right to picket peacefully. *La France Electrical Co. v. International Electrical Workers, supra; Wiley v. Retail Clerk Ass'n Union, supra.* The Supreme Court of the United States has likewise afforded protection on the grounds that peaceful picketing, in connection with a labor dispute, is an exercise of the right of free speech. *A. F. L. v. Swing,* 312 U.S. 321 (1941). Under the LMRA certain labor practices enumerated in Section 8(b) (4) and reiterated in Section 303(a) are declared unfair and when found to exist the Board is empowered under Section 10 to petition any district court of the United States for appropriate temporary relief or restraining order to enjoin them. Certain of these practices may involve peaceful picketing, and the language of the Act would thus seem to permit the Board to seek an injunction against behaviors heretofore protected under the free speech doctrine. The constitutionality of these provisions remains to be determined.

In the principal case the court issued an injunction at the request of the employer, not of the Board. In so doing it relied upon Section 303, paragraph (b) of which states, "Whoever shall be injured . . . may sue . . . in any other court having jurisdiction of the parties, and shall recover the damages by him sustained. . . ." During debate in the Senate on this section of the Taft-Hartley Act four Senators advocated an amendment to provide injunctive relief as well as suits for damages but this amendment was defeated and no provision for injunctions was included in this section in the final draft. Senator Taft, in repelling Senator Morse's fear that Section 303 might give rise to the granting of injunctions, replied, "Let me say . . . that that [the granting of injunctive relief under Section 303] is not the intention of the author . . . it is not his belief as to the effect of it . . . and it is not the advice of counsel to the committee." 93 CONG. REC. 5074 (1947). The Supreme Court of the United States, in construing the Act, has taken cognizance of the legislative intent by saying, " . . . the law has been changed only where an injunction is sought by the National Labor Relations Board, *not where proceedings are instituted by a private party.*" (Emphasis supplied.) *Bakery Sales Drivers Union v. Wagshal,* 68 Sup. Ct. 630, 632 (1948). Two recent cases denied the existence of jurisdiction in such actions brought by interested parties. *Amazon Cotton Mill v. Textile Workers,* 21 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2605 (C.C.A. 4th April 1, 1948); *Gerry v. International Garment Workers,* 21 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2209 (Cal. Super. Ct. Jan. 13, 1948). Thus it would appear that injunctive

relief should not be among the remedies available to the employer under Section 303.

Prior to the Taft-Hartley Act it had been held permissible for a union, having a grievance against a manufacturer, to picket a retail establishment in which its products were sold, provided only there was some "unity of interest" between the manufacturer and the retailer. *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910 (1937); *People v. Briesblatt*, 34 N.Y.S. 2d 184 (Sup. Ct. 1942). Sections 8(b) (4) (A) and 303(a) (1) of the LMRA read, "It shall be unlawful . . . for any labor organization to engage in . . . a strike . . . where an object thereof is forcing or requiring any employer . . . or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." The term "any employer" would include the plaintiff, but the behavior precluded under this section has not been directed against Schmidt but rather against Schmidt's customers. It was not an objective of the strike to force the plaintiff to cease handling the products of another person; rather it was to force the plaintiff's customers to cease dealing with Schmidt. A committee report embracing this section included the following example of those practices outlawed: "It would be unlawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)." Report No. 104, *Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 22 (1947). As the example given seems to duplicate the fact pattern presented in the principal case it would appear that the defendants' picketing of the plaintiff's customers' places of business now constitutes an illegal boycott under the two quoted sections. The analysts for the Bureau of National Affairs and Prentice-Hall concur that such a practice would be enjoinable under the Act. Thus undoubtedly this particular phase of the picketing would be enjoinable at the instigation of the Board as being in violation of Section 8(b) (4) (A). Also the plaintiff apparently could recover the damages sustained as a result of the secondary boycott as per Section 303(b), but in seeking an injunction Schmidt was mistaken as to the proper remedy and the court was in error in taking jurisdiction.

The second part of the decree in the principal case enjoined the employees from picketing their own employer's place of business. Here the court relied on Section 303(a) (2) of the LMRA which reads, "It shall be unlawful . . . for any labor organization to engage in . . . a strike . . . where an object thereof is forcing or requiring any *other* employer to recognize or bargain with a labor organization . . . unless such labor organization has been certified

as the representative of such employees under . . . Section 9 of the National Labor Relations Act." (Emphasis supplied.) The logical conclusion is that the phrase "any other employer" embraces all employers except the employees' own. Especially is this true when read in conjunction with Section 303 (a) (3) which says, "It shall be unlawful . . . for any labor organization to engage in . . . a strike . . . where an object thereof is forcing or requiring *any* employer to recognize or bargain with a particular labor organization as the representative of his employees if *another* labor organization has been certified as the representative of such employees under . . . Section 9 of the National Labor Relations Act." (Emphasis supplied.) The Senate report on Sections 8(b) (4) (B) and 303(a) (2) comments, "It is intended to reach strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed." SEN. REP. No. 105, 80th Cong., 1st. Sess. 22 (1947). This latter sentence, describing exactly the fact situation in the case at bar, would therefore preclude any relief against the employees' picketing of their own employer's place of business. Since no other union was involved Section 303(a) (3) cannot be relied upon to extend relief to the plaintiff. Neither would Section 303 (a) (2) apply since the union was not making demands of another employer but rather of the employees' own employer.

None of the other provisions of the LMRA would seem to deter the defendants in the exercise of their right to picket peacefully. Section 13 of the Act states, "Nothing in this act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." "Except as provided for herein" refers to the unfair labor practices listed in Section 8(b) (4) and restated in Section 303(a).

That the court lacked the authority to enjoin the peaceful picketing of the plaintiff's place of business under the Ohio law seems apparent. *La France Electrical Co. v. International Electrical Workers, supra; Wiley v. Retail Clerk Ass'n Union, supra.* That no such authority has been conferred by the Taft-Hartley Act seems equally irrefutable when the legislative history and judicial interpretation of that unequivocal enactment are considered.

George D. Massar

PATENTS — DISCOVERY OF THE PHENOMENA OF NATURE

Plaintiff sued for infringement of a patent issued for a bacteria culture; defendant counterclaimed for a declaratory judgment that the patent be adjudged invalid. *Held,* patents cannot be issued for the discovery of the phenomena of nature; as such the patent is invalid for want of invention. *Funk Bros. Seed Co. v. Kalo Inoculant Co.,* 68 Sup. Ct. 440 (1948).

Leguminous plants take nitrogen from the air and fix it in the plant for conversion to organic compounds. The ability of these plants to take nitrogen from the air depends on the presence of Rhizobia bacteria which infect and form nodules on the roots of the plant. There are at least six species of Rhizobia bacteria, each of which will infect only a particular plant.

Prior to the instant discovery, inoculants contained only one species of bacteria because the species when mixed produced an inhibitory effect on each other. Bond, the patentee, successfully combined several species to form a mixed culture capable of inoculating all leguminous plants and obtained a patent for his discovery.

To be patentable, the final product must be properly classifiable as an invention or discovery of a new and useful art, machine, manufacture, or composition of matter. REV. STAT. §4886 (2d ed. 1878), as amended, 35 U.S.C. §31 (1940). The issue in this case was whether the patent constituted a "composition of matter" within the contemplation of the patent laws, or whether the patent claim was directed merely to a natural element per se. A discovery of the properties of nature per se is not patentable. *De Forest Radio Co. v. General Electric Co.,* 283 U.S. 664, 684 (1931); *Le Roy v. Tatham,* 14 How. 156, 175 (U.S. 1852).

It has been said that "composition of matter" presupposes a combination of elements. *Dennis v. Pitner,* 106 F. 2d 142 (C.C.A. 7th 1939), *cert. denied,* 308 U.S. 606 (1939). However, a true "aggregation" of independent elements is unpatentable if each element performs its same function. *Richards v. Chase Elevator Co.,* 158 U.S. 299, 302 (1895). The association of a rubber eraser on a lead pencil is not patentable because their is no joint operation. *Reckendorfer v. Faber,* 92 U.S. 347, 358 (1875). With reference to the combination of a washing machine and wringer it was said that merely bringing old devices into juxtaposition and allowing each to work out its own effect without the production of something novel is not invention. *Grinnell Washing Machine Co. v. Johnson Co.,* 247 U.S. 426, 432 (1918). Accord, *Siekert & Baum Stationery Co. v. Stationers Loose Leaf Co.,* 51 F. 2d 326, 328 (C.C.A. 7th 1931).

The law of nature defense may be sustained when the patent claim is directed to a natural element, or product, *without more.*

If, however, the invention is a natural element to be used for a new and useful end, there is authority to uphold the patent. *Telephone Cases,* 126 U.S. 1, 534 (1887) (Patent claim was upheld for putting a continuous current of electricity into a specified condition and using it in that condition, although electricity was used in its natural state). Accord, *Cameron Septic Tank Co. v. Village of Saratoga Springs,* 159 Fed. 453 (C.C.A. 2d 1908). Similarly, a scientific truth is not a patentable invention, but a novel and *useful* structure created with the aid of scientific truth may be. *Mackay Radio & Telegraph Co. v. Radio Corp. of America,* 306 U.S. 86, 94 (1939).

The court in the instant case was content to invalidate the Bond patent by saying that it was a discovery of a phenomenon of nature and as such was not patentable. *Le Roy v. Tatham, supra.* However, the court did recognize those cases which upheld patents of a law of nature discovery when the patents were to be used for new and useful ends. *Telephone Cases, supra.* The court thought that a new result was lacking here when they said, "Each of the species of . . . bacteria . . . infects the same group of leguminous plants which it always infected. . . . The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. . . . They serve the ends nature originally provided and act quite independently of any effort of the patentee." *Funk Bros. Seed Co. v. Kalo Inoculant Co.,* 68 Sup. Ct. 440, 442 (1948).

It would seem that the court could have invalidated the patent by an analogy to the "aggregation cases." If it be true that each of the bacterial species functions independently of the other, then the patent is probably one of the rare cases of a true aggregation with an independency of action such as the *lead* and the *rubber* of a pencil. *Reckendorfer v. Faber, supra.* However, it is submitted that the patent might have been upheld as a discovery which fulfills a new and useful end. *Mackay Radio & Telegraph Co. v. Radio Corp. of America, supra.* Bond's mixture has the new property of multi-service applicability; the multi-service feature is of great importance to the farmer in eliminating the need of a different inoculant for each plant, and to the dealer in decreasing his inventory.

Charles M. Deitle

TORTS — DEFAMATION — CENSORSHIP OF POLITICAL BROADCAST

Air time was contracted for by several candidates for political speeches. After reading one of the scripts, the station canceled the broadcasts through fear of being sued for defamation. The candidates lodged a complaint before the Federal Communication Com-

mission to have the station's license revoked for illegal censorship under Section 315 of the Communications Act (48 STAT. 1088 (1934), 47 U.S.C. §315 (1940). *Held*, license renewed. *Port Huron Broadcasting Co.*, F.C.C. Docket No. 6987, Jan. 30, 1948.

Although the Commission found that the station's act of canceling the broadcast was a violation of Section 315 which reads, "If any licensee shall permit . . . a candidate to use a broadcasting station . . . such licensee shall have no power of censorship over the material broadcast," it reasoned that revocation of the license was not justified in view of the good faith of the station and the prior unsettled state of the law concerning this provision. See Guider, *Liability for Defamation in Political Broadcasts*, 2 J. RADIO L. 708 (1932). Before deciding that the station was guilty of illegal censorship, the Commission felt constrained to point out that a radio station was relieved from liability for defamation in a political broadcast. It was this pronouncement that brought forth a separate and vigorous opinion by Commissioner Jones.

In the leading case on radio defamation, a broadcasting station, subsequent to the passage of Section 315, was held liable for defamatory statements uttered by a political speaker. *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed*, 290 U.S. 599 (1933). The rationale of this decision was that the statutory provision prohibiting censorship merely prevents the licensee from censoring words as to their political and partisan trend, and does not give the station the privilege of joining and assisting in the publication of libel. Liability was based on the analogy between radio stations and newspapers. But see MOSER AND LEVINE, RADIO AND THE LAW, 80 (1947); Guider, *Liability for Defamation in Political Broadcasts, supra*, at 713. The Commission in the instant hearing rejected this analogy and used instead that of the telegraph, feeling that the inability on the part of the station to censor material puts them in the same position as a telegraph company which must accept all messages. *O'Brien v. Western Union Teleg. Co.*, 113 F. 2d 539 (C.C.A. 1st 1940); *Gray v. Western Union Teleg. Co.*, 87 Ga. 350, 13 S.E. 562 (1891).

The only other case found on this express problem held that a corresponding qualified privilege against liability should go along with the censorship aspect of the act. *Josephson v. Knickerbocker Broadcasting Co.*, 38 N.Y.S. 2d 985, 179 Misc. 787 (Sup. Ct. 1942).

The legislative history of Section 315 is illuminating. It was taken over without change from Section 18 of the Radio Act of 1927 (44 STAT. 1162). The Senate draft of Section 18 contained a prohibition against both censorship and liability for defamation. See H.R. 9971, §4, 69th Cong., 1st Sess., with Senate amendments (1926). The latter was dropped without reason in the final bill.

H.R. REP. No. 1886, 69th Cong., 2d Sess. (1927). Suggestions for curing this alleged deficiency have been advanced periodically but nothing has been done to modify the act. See *Hearings before Committee on Interstate Commerce on* S. 2910, 73d Cong., 2d Sess., 63, 66-67 (1934).

Recent state statutes have adopted a more liberal approach to the question. See MONT. REV. CODES ANN. §5692.1 (Supp. 1939); FLA. STAT. ANN. §770.03 (1944); IOWA CODE §659.5 (1946). The most recent act is the Illinois statute which renders absolute the station's immunity to the consequences of the remarks of a political speaker. ILL. ANN. STAT. c. 38, §404.2 (Supp. 1947).

The Communications Act of 1934 gives the FCC broad regulatory powers over radio. See Comment, 12 AIR L. REV. 372 (1941). This power has been liberally interpreted by the Supreme Court. See Barber, *Competition, Free Speech and FCC Radio Network Regulations*, 12 GEO. WASH. L. REV. 34 (1943). But in this hearing as Commissioner Jones pointed out, there was no issue of defamation before the Commission and such determination was dictum.

Norman W. Shibley

TORTS—DISCIPLINARY ACTION BY RELIGIOUS SOCIETY AS INFRINGEMENT OF CIVIL LIBERTY

Plaintiff had been a member of the Old Amish Church, but had withdrawn and joined a more liberal congregation. Soon after his withdrawal he bought an automobile to transport his infant daughter to a doctor. The purchase of the automobile was deemed a violation of the Articles of Faith of the Old Amish Church, which forbids members to use more modern means of transportation than a horse and buggy. The Old Church imposed a "mite" upon plaintiff, even though he was no longer a member of their society. Every member of the old order was compelled to shun the plaintiff or be "mited" himself. The plaintiff, contending that the boycott violated his civil rights, sought to have it enjoined, and asked $40,000 damages. *Held*, injunction granted and $5,000 damages awarded. *Yoder v. Helmuth*, Ohio C. P., Wayne Co., Nov. 7, 1947.

A boycott is a combination formed to make good a threat of injury against a party unless he yield to the desires of the conspirators. *Dick v. Northern Pacific Ry.*, 86 Wash. 211, 150 Pac. 8 (1915).

The Ohio courts do not deny that upon questions of the discipline of members arising under a given religious code, such as the Articles of Faith of the Amish Church, the decisions of the church are ordinarily final. *Ginerich v. Swartzentruber*, 22 Ohio N.P.

(N.S.) 1 (1919); *Harrison v. Hoyle*, 24 Ohio St. 254 (1873). However, acts "evil in their nature," or dangerous to the public welfare, will be forbidden and punished as a violation of the civil law though sanctioned by one or more religions. *State v. Marble*, 72 Ohio St. 21, 73 N.E. 1063 (1905); *Bloom v. Richards*, 2 Ohio St. 387 (1853).

Even if the plaintiff had remained a member of the Old Amish Church, it would seem that the disciplinary measures reached unlawful extremes. Certainly, the Ohio courts have made it clear that the basic concept of religious freedom includes the right of the individual to believe whatever he wishes and the right to withdraw from one church and join another. *Ginerich v. Swartzentruber, supra.*

Under no circumstances can a religious group be permitted to resort to concerted action in derogation of an individual's civil rights. It seems evident that the "mite" was an intentional and coercive interference with the plaintiff's right to be unmolested in business and society, and was, therefore, properly enjoined.

Charles E. Westervelt, Jr.

Trusts—Beneficiary's Right to Choose Between Annuity and Land

The settlor established a testamentary trust whereby the trustee was empowered to manage, lease or sell five parcels of real estate. Each of the beneficiaries was to receive income from one particular parcel of land. The settlor further provided that if the trustee in the exercise of his discretionary power should sell a parcel he was to purchase with the proceeds of the sale an annuity for the beneficiary who had been deriving income from that parcel. The trust was limited to a period of fifteen years of which six years remain. Two of the beneficiaries sought to obtain the fee simple title in their particular parcels of land. *Held*, the beneficiaries cannot have fee simple title in the land because it is the *res* of an active trust which the settlor intended should run for six more years. *Feiler v. Feiler*, 149 Ohio St. 17, 77 N.E. 2d 237 (1948).

The interesting phase of the litigation is the decision rendered by the court of appeals. 48 Ohio L. Abs. 262, 74 N.E. 2d 384 (1947). That court held that the beneficiaries could not have the land, because the settlor intended that the beneficiaries should have the annuities which were to be purchased from the proceeds of the land sale.

The beneficiaries were seeking the land rather than the annuities which were to be purchased for them according to the intent of the settlor, if and when the trustee chose to sell the land. In cases where the settlor has directed that the land be sold and the proceeds given to the beneficiary most courts have permitted the beneficiary to take the land. Ohio has recognized this equitable conversion doctrine. See *Holt v. Lamb*, 17 Ohio St. 374 (1867). When the trust instrument has directed an anuuity be purchased for the beneficiary, most courts have permitted the beneficiary to take the cash in lieu of the annuity. *Barnes v. Rowley*, 3 Vesey Jr. 305, 30 Eng. Rep. 1024 (1797), In Re *Brunning*, 1 Ch. 276, 78 L.J. Ch. 75, 99 L.T. 918 (1909), In Re *Robbins*, 2 Ch. 8, 76 L.J. Ch. N.S. 53 (1907), *Parker v. Cobe*, 208 Mass. 260, 94 N.E. 476 (1916), *Reid v. Brown*, 54 Misc. 481, 106 N.Y. Supp. 27 (1907). The New York legislature has changed the rule of its court decisions by a statute which requires that the annuity be purchased if such was directed by the settlor. N. Y. DECEDENT ESTATE LAW §476. In those jurisdictions where the beneficiary may take the land instead of the cash and where he can take the cash instead of the annuity, it would seem to follow logically that he could take the land instead of the annuity.

The reason given for permitting the beneficiary to take the land instead of the cash from the sale is that ordinarily the beneficiary, if given the money, can purchase the land and thus render nugatory the sale of the land. The courts will not compel the performance of circuitous acts. The same reason is given for permitting the beneficiary to take the cash instead of the annuity. But ordinarily an annuity cannot be sold for the same amount that was used to purchase it. The person purchasing an annuity from the beneficiary will probably do so at a discount to compensate for the risk involved, *i.e.*, the duration of the beneficiary's life. Therefore the similarity in the two situations fails because the beneficiary, while receiving an equal value by taking the land or the cash, would get a greater value by taking the cash instead of the annuity.

Another aspect of this problem and perhaps the one most to be considered in Ohio is the matter of the intent of the settlor. In those jurisdictions which permit a departure from the express intent of the settlor it would seem logical that they would permit such an election between an annuity and the cash. In England, one who has the sole equitable interest and is *sui juris*, may terminate the trust prior to the time designated by the settlor. *Saunders v. Vautier*, 4 Beav. 115 (1841). Hence where the testator directed that the annuitant shall not be entitled to the value of the annuity and that if he sought to sell it, it was to cease and revert, the English court held that the annuitant was entitled to the sum if he so chose. *Hunt-Foulston v. Furber*, 3 L.R. Ch. Div. 285, 24 Week Rep. 756

(1876); *Stokes v. Cheek,* 28 Beav. 620, 29 L.J. Ch. N.S. 922 (1860). But in America, the indestructible trust doctrine is upheld by most courts. *Claflin v. Claflin,* 149 Mass. 19, 20 N.E. 454 (1889); *Stier v. Nashville Trust Co.,* 158 Fed. 601 (C.C.A. 6th 1908); *Jourolman v. Massingill,* 86 Tenn. 81, 5 S.W. 719 (1887); White, *Indestructible Trusts in Ohio,* 2 U. OF CIN. L. REV. 333 (1928). Since the intent of the settlor is stressed and held to be all-controlling in those cases, it should likewise be stressed in the matter of purchasing an annuity.

Ohio has emphasized the importance of following the intent and wishes of the settlor so long as they do not contravene public policy. *Union Savings Bank & Trust Co. v. Alter,* 103 Ohio St. 188, 132 N.E. 834 (1921). The annuity is comparable to a trust in that the beneficiary derives income periodically from a sum of money or property set aside for that purpose. Undoubtedly the settlor intends to have the beneficiary well provided for, whether it be by trust or by annuity. Thus, if and when this problem of election arises before the Ohio Supreme Court, it well may carry out the intent of the settlor and deny the beneficiary the right to elect between an annuity and cash and also, deny the right to have land in lieu of an annuity.

Jack W. Folkerth

WILLS—CONSTRUCTION OF AMBIGUOUS DEVISE—FEE SIMPLE OR LIFE ESTATE?

Testatrix was beneficiary of her sister's will, which read in part: ". . . the balance of my estate both real and personal of every description be given to my sister, . . . to do with and use as she sees best fit to do. And after her death what is left if any be given to my nephew's children." Plaintiffs are the nephew's children and claim as remaindermen under the clause; defendant is testatrix' husband, executor and residuary devisee. Plaintiffs contend that the first taker (the testatrix) took only a life estate with a power of disposition under the clause under construction. Defendant contends first taker took a fee and that plaintiffs took nothing, the attempted limitation over being void. *Held,* first taker received a life estate with a power to consume for her benefit. *DeWolf v. Frazier,* 80 Ohio App. 150, 73 N.E. 2d 212 (1947).

The case is in accord with the Ohio line of authority in construing an ambiguous devise with an accompanying power as a devise of a life estate. *Baxter v. Bowyer,* 19 Ohio St. 490 (1866); *Johnson v. Johnson,* 51 Ohio St. 446, 38 N.E. 61 (1894); *Robbins v. Smith,* 72 Ohio St. 1, 73 N.E. 1051 (1905); *Fetter v. Rettig,* 98 Ohio St. 428, 121

N.E. 696 (1918); *Raymund v. Williams,* 100 Ohio St. 544, 127 N.E. 925 (1919); *Tax Commission v. Oswald,* 109 Ohio St. 36, 141 N.E. 678 (1923); *Murphy v. Widows' Home and Asylum,* 21 Ohio App. 174, 151 N.E. 783 (1925).

Baxter v. Bowyer, supra, is a leading case for the proposition that a devise in general terms, which by itself would be sufficient to pass a fee, vests only a life estate where a gift over of a remainder follows the primary devise. At the time the *Baxter* case was decided, the leading cases in the field held, under similar fact situations, that the devise was of a fee, and that the attempted limitation over was void. *Jackson,* ex dem. *Brewster v. Bull,* 10 Johnson 19 (N.Y. 1813); *Jackson,* ex dem. *Livingston v. Robins,* 16 Johnson 537 (N.Y. 1819). The court in the *Baxter* case justified their decision on a slight distinction between the words of the grant of the remainder in the Ohio situation and those of the instruments under construction in New York. The court stated that the words "all the property remaining" in the Baxter will imported considerably less control of the property by the first taker than did the words "such part of the estate as . . . (the devisee) . . . chose to leave" in the two New York cases, and therefore held that the Baxter will conveyed only a life estate to the first beneficiary. This fine distinction has apparently never been made by courts in other states and has not been made by the courts of Ohio in subsequent cases, although the courts have uniformly reached the same result as did the court in the *Baxter* case.

Later Ohio cases, in determining the nature of the estate devised have relied on several intrinsic factors. If the words of the devise state specifically "for life," there is, of course, no problem. If the devise is in general terms, the presence and nature of any power of disposition of the subject matter is significant, but not controlling. Where the estate given is not accompanied by any power of disposition, it is generally held that the devise is one of a fee simple and that any attempted limitation over is void. *Steuer v. Steuer,* 8 Ohio C.C. (N.S.) 71, 28 Ohio C.C. 145 (1905); *Trumbull v. Stentz,* 30 Ohio App. 34, 164 N.E. 57 (1929); *Krumm v. Cuneo,* 71 Ohio App. 521, 47 N.E. 2d 1001 (1942). Also, where the estate given is accompanied by an unlimited and unrestricted power of absolute disposition of the subject matter of the devise, it is generally held that the devise is one of a fee simple, and that any attempted limitation over is void. *Wells v. Brown,* 167 C.C.A. 180, 255 Fed. 852 (1919); *Eubank v. Smiley,* 130 Ind. 393, 29 N.E. 919 (1892); *Kelley v. Meins,* 135 Mass. 231 (1883); *Helmer v. Shoemaker,* 22 Wend. 137 (N.Y. 1879). In only one instance have the courts of Ohio construed the accompanying power as being unlimited and unrestricted and in that case the estate had been conveyed by the first taker in her lifetime,

Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N.E. 770 (1904). Where the power of disposition in the first taker is limited as to its exercise—e.g., a power to dispose of in any manner she choose except by will—the devise is construed as one of a life estate only. *Tuthill v. Davis*, 121 App. Div. 290, 105 N.Y. Supp. 672 (2d Dep't 1907); *Johnson v. Johnson, supra*; *Tax Commission v. Oswald, supra*; *Murphy v. Widows' Home and Asylum, supra.*

The *Johnson* case, *supra*, exemplifies the reluctance of the Ohio courts to invalidate a remainder over in the face of a power of disposition in the first taker. In that case, the power was described in the will as "full power to bargain, sell, convey, exchange or dispose of as she may think proper." The court held that the devisee was limited as to the exercise of the power to the consumption of the property during her lifetime. The court cited *Baxter v. Bowyer* but made no mention of the distinction in wording discussed earlier. Since the Johnson case, the courts have tended to infer from the presence of any power that the intention of the testator was to grant a limited power of consumption during the lifetime of the first taker, and thus have validated otherwise meaningless gifts over to successive remaindermen.

Myron E. Reinman